NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GENE MORAN, Defendant - Appellant.	No. 02-10372 D.C. No. CR-99-00365-PMP MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted June 10, 2003
San Francisco, California

Before: SCHROEDER, Chief Judge, D.W. NELSON, and W. FLETCHER, Circuit Judges.

Gene Moran challenges his conviction and sentence for negligent discharge of a pollutant into a publicly owned water treatment works in violation of the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Clean Water Act, 33 U.S.C. §§ 1251–1387. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and we affirm.

The district court did not abuse its discretion in admitting the testimony of Jeffrey Yoshimoto, *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000), nor was this ruling "manifestly erroneous," *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000). The district court properly determined that Yoshimoto's testimony was both relevant and reliable. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). Edward Helal's deviation from his sampling plan speaks to the weight the jury should have given Yoshimoto's testimony, not its admissibility. *See United States v. Chischilly*, 30 F.3d 1144, 1154 (9th Cir. 1994).

Likewise, the district court did not abuse its discretion in admitting John Gold's testimony. While the infirmities and inconsistencies in Gold's testimony raised questions about his believability, assigning the appropriate weight and credibility to otherwise admissible witness testimony is exclusively a task for the jury. *United States v. Scheffer*, 523 U.S. 303, 313 (1998).

The district court also did not err in sentencing Moran. First, the relevant Guideline lists negligent mens rea as a relevant and appropriate consideration in sentencing. U.S.S.G. § 2Q1.2, Application Note 4 ("[T]his section assumes

knowing conduct. In cases involving negligent conduct, a downward departure may be warranted."). Second, nothing supports Moran's contention that similar lawful sentences imposed on defendants found to have different mens rea, but to have committed the same conduct is erroneous. *See United States v. Hall*, 7 F.3d 1394, 1396–97 (8th Cir. 1993). Third, we do not have jurisdiction to review the district court's discretionary refusal to depart from the Guidelines. *United States v. Romero*, 293 F.3d 1120, 1126 (9th Cir. 2002). Fourth, the district court did not err in relying on acquitted conduct that was proved by a preponderance of the evidence in sentencing Moran. *United States v. Watts*, 519 U.S. 148, 157 (1997).

Finally, we cannot "revisit" *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), as Moran urges us to do. "'[O]ne three-judge panel of this court cannot reconsider or overrule the decision of a prior panel.'" *United States v. Johnson*, 297 F.3d 845, 865 (9th Cir. 2001) (quoting *United States v. Gay*, 967 F.2d 322, 327 (9th Cir.), *cert. denied*, 506 U.S. 929 (1992)).

AFFIRMED.